Chase Perdana Bhd v Md Afendi bin Hamdan

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-12 OF 2009(S)
ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA AND JAMES FOONG FCJ
15 SEPTEMBER 2009

Contract — Conditional contract — Sale of shares — Contract conditional upon obtaining of approvals of Ministry of Finance and Foreign Investment Committee — Approval not given — Whether contract would be performed — Whether parties could waive statutory requirement for approval by conduct — Whether waiver contrary to public policy — Contracts Act 1950 s 24

Contract — Oral agreement — Variation of terms of written agreement — Whether oral agreement inconsistent with terms of written agreement — Evidence Act 1950 s 92(b)

Evidence — Parol evidence rule — Oral evidence — Whether oral evidence could be adduced to contradict written contract — Whether oral agreement inadmissible where it inconsistent with terms of written agreement — Whether oral agreement recognised in law — Whether oral evidence admissible — Evidence Act 1950 s 92(b)

The appellant by a letter of undertaking agreed with the respondent to pay RM5m for the respondent's shares in a company known as Jernih Kaya Sdn Bhd ('Jernih Kaya'). Pursuant to this, the appellant paid a deposit of RM1m and the balance of RM4m was to be paid upon the approval of the transaction by the Ministry of Finance ('MOF') and the Foreign Investment Committee ('FIC'). However, the MOF and FIC refused to give approval. In the circumstances, the appellant claimed for the return of the deposit. Dispute arose as to whether the respondent was obliged to refund the RM1m deposit. The High Court dismissed the appellant's claim and allowed the respondent's counterclaim ordering the appellant to pay the remaining RM4m. The High Court found that there was an oral agreement between the parties that varied the terms of the letter of undertaking. The Court of Appeal also held that the parties had agreed to waive the conditions set by the FIC and MOF and consequently dismissed the appellant's appeal. Leave was granted for appeal to the Federal Court on the following questions: (i) Where a written agreement provides that approval of the FIC and the MOF be

obtained for the transfer of shares in a company, can the parties, by conduct, waive such requirement? (ii) if the answer is in the affirmative, whether such a waiver is contrary to public policy under s 24 of the Contracts Act 1950; and (iii) whether an alleged oral agreement, in contravention of the written agreement between the parties could have been recognised in law under ss 91 and 92 of the Evidence Act 1950 ('the Act').

Held, allowing the appeal with costs here and below:

(1) Parties to an agreement cannot waive statutory requirements. The MOF's approval was required under the Securities Industries Act 1983 and the Securities Industries Regulations 1987. Once it is enacted by legislation, the parties are required to comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. The answer to the first question was therefore in the negative and consequentially, the second question must be answered in the affirmative (see paras 17–18, 22–23).

(2) Section 92(b) of the Act relates to an oral agreement as to any matter on which the original document is silent and which is not inconsistent with the terms. This was not the case here. What the respondent was supposed to have agreed to orally was in direct contradiction to the terms appearing in the letter of undertaking and the agreement and was not a term which the original document was silent. The letter of undertaking required that the relevant authorities' approvals be obtained whilst the so called oral agreement was supposed to have waived this condition. The proviso (b) in s 92 of the Act therefore could not apply in this case. The third question was therefore answered in the negative (see paras 27–28).

[Bahasa Malaysia summary

Perayu melalui surat akujanji telah bersetuju dengan responden untuk membayar RM5 juta untuk saham-saham responden dalam syarikat yang dikenali sebagai Jernih Kaya Sdn Bhd ('Jernih Kaya'). Berikutan ini, perayu telah membayar deposit RM1 juta dan baki RM4 juta yang perlu dibayar setelah mendapat kelulusan transaksi oleh Kementerian Kewangan ('KK') dan Jawatankuasa Pelaburan Asing ('JPA'). Walau bagaimanapun, KK dan JPA enggan memberikan kelulusan. Dalam keadaan sedemikian, perayu telah menuntut agar deposit dipulangkan. Pertikaian timbul sama ada responden diwajibkan memulangkan deposit RM1 juta itu. Mahkamah Tinggi telah menolak tuntutan perayu dan membenarkan tuntutan balas responden memerintahkan perayu membayar baki RM4 juta tersebut. Mahkamah Tinggi mendapati bahawa terdapat perjanjian secara lisan antara pihak-pihak

yang mengubah terma-terma surat akujanji. Mahkamah Rayuan juga telah memutuskan bahawa pihak-pihak telah bersetuju untuk mengetepikan syarat-syarat yang ditetapkan oleh JPA dan KK dan akhirnya menolak rayuan perayu. Kebenaran telah diberikan untuk merayu ke Mahkamah Persekutuan atas persoalan-persoalan berikut: (i) di mana perjanjian bertulis memperuntukkan bahawa kelulusan JPA dan KK diperoleh untuk pemindahan saham dalam syarikat, bolehkah pihak-pihak melalui perlakuan mengetepikan keperluan tersebut; (ii) jika jawapannya mengiakan, sama ada pengetepian tersebut bertentangan dengan polisi awam di bawah s 24 Akta Kontrak 1950; dan (iii) sama ada perjanjian lisan yang didakwa, bertentangan dengan perjanjian bertulis antara pihak-pihak boleh diterima dari segi undang-undang di bawah ss 91 dan 92 Akta Keterangan 1950 ('Akta').

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Rayuan:

(1) Pihak-pihak kepada perjanjian tidak boleh mengetepikan keperluan-keperluan statutori. Kelulusan KK dikehendaki di bawah Akta Perindustrian Sekuriti 1983 dan Peraturan-Peraturan Perindustrian Sekuriti 1987. Apabila ia digubal oleh badan perundangan, pihak-pihak dikehendaki untuk mematuhi peruntukan tersebut. Ia bukan untuk sesiapa untuk mengetepikan keperluan-keperluan perundangan melalui perjanjian kecuali jika badan perundangan membenarkan ia dilakukan. Jawapan kepada persoalan pertama oleh itu adalah negatif dan berikutan itu, persoalan kedua hendaklah dijawab dengan mengiakan (lihat perenggan 17–18, 22–23).

(2) Seksyen 92(b) Akta adalah berkaitan perjanjian lisan terhadap apa-apa perkara yang tiada dalam dokumen asal dan yang bukan tidak konsisten dengan kepada terma-terma. Ini bukan kesnya di sini. Apa yang sepatutnya responden persetujui secara lisan adalah dalam percanggahan langsung kepada terma-terma yang terdapat dalam surat akujanji dan perjanjian itu dan bukan terma yang tiada dalam dokumen asal. Surat akujanji menghendaki kelulusan pihak berkuasa yang relevan diperoleh manakala perjanjian lisan pula sepatutnya telah mengetepikan syarat ini. Proviso (b) dalam s 92 Akta dengan itu tidak boleh terpakai dalam kes ini. Oleh itu persoalan ketiga dijawab secara negatif (lihat perenggan 27–28).]

Notes

For a case on variation of terms of written agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 4551.

For cases on conditional contract generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3006–3019.

For cases on oral evidence, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1959–1967.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47, PC (folld)
Dhanukdhari Singh & Anor v Nathima Sahu & Ors (1907) 11 Cal WN 848, HC (folld)
Surajmull Nargoremull v Triton Insurance Company Limited (1924) LR 52 IA 126, PC (refd)
Waman Shriniwas Kini v Ratilal Bhagwandas and Co AIR 1959 SC 689 (folld)

Legislation referred to

Capital Markets Services Act 2007
Contracts Act 1950 s 24
Evidence Act 1950 ss 91, 92, 92(a), (b), (c), (d), (e), (f)
Securities Industries Act 1983 (repealed by the Capital Markets Services Act 2007) ss 12, 18, 21
Securities Industries Regulations 1987 (repealed) reg 3, Second Schedule Forms

Cyrus Das (Francis Wong with him) (William Liaw, Chan & Lo) for the appellant.
Cecil Abraham (Jeyan Marimuttu with him) (Jeyan Marimuttu & Partners) for the respondent.

Zaki Azmi Chief Justice:

[1] The dispute in this appeal is whether the respondent is obliged to refund RM1m paid as a deposit to the respondent by the appellant for the purchase of all RM5m worth of respondent's shares in Jernih Karya Sdn Bhd ('Jernih Karya') pursuant to a letter of undertaking dated 24 June 1997 ('letter of undertaking') with certain conditions as will be explained later. If the answer is in the negative, the appellant will then have to pay the balance of RM4m to the respondent, since RM1m had been previously paid.

[2] Sometime around June 1997, the Ministry of Finance ('MOF') approved the establishment of a securities broking firm known as First Securities Sdn Bhd ('First Securities') pursuant to s 12 of the then Securities Industries Act 1983. (The Security Industry Act 1983 was later consolidated with the Futures Industry Act 1993 to become the Capital Markets Services Act 2007 on 28 September 2007). First Securities shall be a holder of a dealer's licence to carry on business as a securities broking firm and it shall be wholly owned by Dioncorp Sdn Bhd. Dioncorp Sdn Bhd in due course shall apply to be a member company of the then Kuala Lumpur Stock Exchange (now known as Bursa Malaysia).

[3] With the approval of the MOF, Yayasan Bumiputra Sabah held 51% of the equity in Dioncorp Sdn Bhd and Jernih Karya, a private limited company, holds the other 49% of the equity. The respondent together with another person by the name of Madrigal Gumba, are the shareholders of Jernih Karya. The respondent held 240 paid up shares in Jernih Karya.

[4] The appellant, a public listed company in the then Kuala Lumpur Stock Exchange, wanted to gain control over First Securities. The appellant appointed Madrigal Gumba to purchase the 240 shares held by the respondent in Jernih Karya. With such transfer of shares, Madrigal Gumba's shareholding in Jernih Karya would increase to 900 shares. The appellant will then purchase all 900 shares held by Madrigal Gumba in Jernih Karya for the sum of RM22m. Through this scheme, the appellant will control Jernih Karya. Indirectly through Jernih Karya, the appellant will have 49% of the equity in Dioncorp Sdn Bhd, the company that wholly owns First Securities. This would enable the appellant to be in control of First Securities.

[5] A letter of undertaking was given by the appellant to the respondent to transfer the 240 shares to Madrigal Gumba in consideration that the appellant pays the respondent a sum of RM5m. That undertaking to transfer the respondent's 240 shares to the appellant was subject to the two following conditions contained in the letter of undertaking:

(i) A deposit of Ringgit Malaysia One Million (RM1,000,000.00) only upon execution and stamping of the following documents:

(a) Sale and Purchase Agreement between Madrigal B Gumba and Chase Perdana Berhad in respect of the purchase by the latter of a certain number of shares in Jernih Karya Sdn Bhd.

(b) Execution of the Shareholders Agreement between Yayasan Bumiputra Sabah and Chase Perdana Berhad in respect of the Joint Venture Investment Company known as Dioncorp Sdn Bhd.

(ii) The balance sum of Ringgit Malaysia Four Million (RM4,000,000.00) only shall be *paid upon the approval of the Foreign Investment Committee and any other relevant authorities* as may be necessary of the Sale & Purchase Agreement between Chase Perdana Berhad and Madrigal B Gumba described under 1(a) above. The Deposit shall be refundable in the event the approval herein are not obtained within a three months from the date hereof. (Emphasis added.)

[6] For the purpose of this appeal, the Foreign Investment Committee will be referred to as 'FIC' and 'any other relevant authorities as may be necessary'

includes the Ministry of Finance's ('MOF') approval as stipulated under the Securities Industries Act 1983 (then in force) and the 1987 Regulations (see ss 12, 18 and 21 of the then Security Industry Act 1983, reg 3 and the Second Schedule Forms under the Regulations).

[7] The sale and purchase agreement between the appellant and Madrigal Gumba, ('the agreement') was executed on 26 June 1997. The contents of cl 5 of the agreement are similar to the terms of the letter of undertaking which state as follows:

5 CONDITIONS PRECEDENT

5.1 Notwithstanding anything to the contrary contained herein the sale and purchase of the Shares is conditional upon the following conditions precedent being fulfilled:

5.1.1 The approval ('the FIC Approval') of the Foreign Investment Committee of the Prime Minister's Department, Malaysia ('the FIC') for the purchase of the Shares being obtained which approval shall be applied for by the Purchaser;

5.1.2 The approval of the Ministry of Finance for the purchase of the Shares upon the terms of this Agreement, which approval shall be applied for by the Purchaser.

[8] In short, the appellant agreed to pay RM5m to the respondent for the transfer of the 240 shares to Madrigal Gumba upon the condition that the approval of MOF and FIC are obtained.

[9] On 28 June 1997, the appellant paid to the respondent the sum of RM1m as the deposit mentioned in the letter of undertaking. The respondent signed an acknowledgement letter dated 28 June 1997 for the receipt of the RM1m deposit which again included an agreement to refund the RM1m in the event the approval by the FIC and any other relevant authorities are not obtained.

[10] Unfortunately, on 12 January 1998, MOF sent a letter to Jernih Karya disapproving the agreement to change the structural equity in Jernih Karya by selling its 51% equity to the appellant. The FIC also rejected the proposed change. This meant that the second condition in the letter of undertaking and cll 5.1.1 and 5.1.2 of the agreement has not been fulfilled.

[11] By not being able to secure the approvals from MOF and FIC, First Securities will not to be a holder of a dealer's licence under the then Securities

Industry Act 1983 in order to carry on business as a securities broking firm. This meant that the RM5m worth of 240 shares in Jernih Karya is worthless.

[12] The appellant then requested the refund of the deposit RM1m which it had previously paid from the respondent. The respondent refused.

[13] An action was then brought by the appellant in the High Court at Kota Kinabalu for the recovery of RM1m paid as a deposit for purchase of shares from the respondent. This claim was dismissed, but the respondent's counterclaim ordering the appellant to pay the remaining RM4m as stipulated in the agreement between them was allowed. The High Court found that there was an oral agreement between the parties that varied the terms of the letter of undertaking. Dissatisfied, the appellant appealed to the Court of Appeal. The Court of Appeal used this basis when it held that the parties had agreed to waive the conditions set by the FIC and MOF to dismiss the appeal.

[14] Leave was granted by this court on the following three questions:

(a) Where a written agreement provides, whether as a requirement of law or policy, that approval of the Foreign Investment Committee ('FIC') and Ministry of Finance ('MOF') be obtained for the transfer of shares in a company, can one party or parties by conduct waive such requirement?

(b) If the answer is in the affirmative, whether such a waiver is contrary to public policy under s 24 of the Contracts Act 1950 ('Contracts Act') in view of the prohibition of the transfer by the FIC, or the overseeing of shareholding by the MOF in stock broking firms under the then Securities Industries Act 1983, and whether therefore the so-called waiver is ineffective in law?

(c) Whether an alleged oral agreement, in contravention of the written agreement between the parties as evidenced by the letter of undertaking dated 24 June 1997, could have been recognised in law under ss 91 and 92 of the Evidence Act 1950 ('Evidence Act') (not being a collateral contract under s 92), and allowed to form the basis of a counterclaim for RM4m which was allowed by the Court of Appeal?

[15] In fact, to make the first question of public interest and more practical, it should be worded as follows:

(a) Where a written agreement provides, whether as a requirement of law or policy, that approval of the Foreign Investment Committee ('FIC') *made under the FIC Guidelines* and *approval of the* Ministry of Finance

('MOF') *under a legislation/statute such as the then Securities Industry Act 1983 or the present Capital Markets Services Act 2007*, be obtained for the transfer of shares in a company, can one party or parties by conduct waive such requirement? (Emphasis added.)

[16] Among the terms spelled out in the letter of undertaking and the agreement were the conditions that FIC and MOF's approval must be obtained. It is not denied that these two approvals were not obtained. The appellant rightly submitted that as long as either of the conditions was not complied with, the letter of undertaking cannot be enforced *unless*, as held by the Court of Appeal, these requirements can be waived.

[17] Counsel for the appellant submitted that the Court of Appeal had erred in the above conclusion. It is his submission that parties to an agreement cannot waive statutory requirements. The MOF's approval is required under the Securities Industries Act 1983 (then in force) and the 1987 Regulations whilst the FIC's condition is only a policy of the government and not backed by any written law. I find that this is the correct statement of the law.

[18] The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. Legislation enacts laws which in its opinion are for the benefit of the public. It is not for the courts, or anybody for that matter, to say that it need not be followed. This was clearly expressed in *Surajmull Nargoremull v Triton Insurance Company Limited* (1924) LR 52 IA 126 at p 128 where Lord Sumner held as follows:

> No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset: *Nixon v Albion Marine Insurance Co* (1867) LR 2 Ex 338. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea-insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or a prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of s 7 would defeat the provisions of the law laid down therein.

[19] The leading Malaysian authority regarding the fulfillment of conditions in a contract is the decision of Lord Jenkins in *Aberfoyle*

Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47 where it was held by the Privy Council that parties must fulfill the conditions stipulated in the agreement. It was thus made plain beyond argument that the fulfillment of a condition precedent in a contract of sale is binding upon the parties. See also *Waman Shriniwas Kini v Ratilal Bhagwandas and Co* AIR 1959 SC 689 and *Dhanukdhari Singh & Anor v Nathima Sahu & Ors* (1970) 11 Cal WN 848.

[20] Factually also, from the terms of the letter of undertaking and subsequently in the agreement, it is without doubt that it was the intention of the parties that the requirements of the FIC's approval and that from any other relevant authorities in respect of the sale and purchase agreement between Madrigal Gumba and the appellant must be obtained. This was the condition precedent in the contract that must be fulfilled. This requirement is further confirmed in the letter dated 28 June 1997 enclosing the payment of the of RM1m deposit.

[21] The respondent, on the other hand, argued that the responsibility for obtaining FIC and MOF's approvals were between the appellant and Madrigal Gumba. It had nothing to do with the respondent. In my opinion, this cannot be so, because the letter of undertaking as well as the letter dated 28 June 1997 enclosing the payment of RM1m, clearly spelled that the respondent agreed to refund the deposit of RM1m in the event the approval of the FIC and other relevant authorities was not obtained. It does not matter whose duty it was to obtain the approval. The fact remains that statutory approval has not been secured. It would have been otherwise, perhaps, if the condition precedent is not one that is required by law.

[22] The MOF's approval in regard to licencing of securities companies is required under s 12 of the then Securities Industry Act 1983. In actual fact, this appeal can be disposed of by only looking into the MOF's requirement issue. In so far as the requirement of the MOF is concerned, since the approval of the MOF is required by legislation and such approval was not obtained, the answer to the first question must be in the negative.

[23] Consequentially, the second question must be answered in the affirmative. That disposes of questions one and two.

[24] The third question is a factual question. Could the alleged oral agreement, entered between the appellant and the respondent, which varies the terms of the letter of undertaking, be recognised in law under ss 91 and 92 of the Evidence Act 1950?

> 91 Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1 — When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2 — Wills admitted to probate in Malaysia may be proved by the probate.

Explanation 1 — This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2 — Where there are more originals than one, one original only need be proved.

Explanation 3 — The statement in any document whatever of a fact, other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

92 Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that —

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its

terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

[25] The alleged oral agreement has been accepted by the learned High Court judge who had the benefit of observing the demeanour of the witnesses. I find no reason to disturb his finding of the existence of an oral agreement.

[26] Counsel for the respondent relies on ss 91 and 92(b) of the Evidence Act and submitted that s 92 of the Evidence Act is meant to be read together with s 91 of the Evidence Act as both provisions relate to the 'best evidence rule'. In essence, these two provisions require the production of the document itself for proof of its contents. It is regarded as embodying the common law rule that where a contract has been reduced to writing, it is the writing that must be looked at for the entire terms made between parties subject to the six provisos embodied in s 92(a)–(f) of the Evidence Act.

[27] Reading s 92(b) of the Evidence Act in particular, it relates to an oral agreement as to any matter on which the original document is silent and which is not inconsistent with the terms. This is not the case in this instance case.

[28] What the respondent was supposed to have agreed to orally is in direct contradiction to the terms appearing in the letter of undertaking and the agreement and is not a term which the original document is silent. The letter

of undertaking and the agreement required that the relevant authorities' approvals be obtained whilst the so called oral agreement is supposed to have waived this condition. The proviso (b) in s 92 of the Evidence Act therefore cannot apply in this case. When the exception does not apply then the terms appearing in the letter of undertaking continue to be applicable.

[29] The respondent then contends that the letter of undertaking between the appellant and the respondent is independent of the sale and purchase agreement between the appellant and Madrigal Gumba. In my opinion, this cannot be so because the letter of undertaking expressly refers to the agreement by the appellant in its request that the respondent transfer all shares in Jernih Karya to Madrigal Gumba thereupon the sale and purchase agreement was executed. The letter of undertaking is therefore not independent of the sale and purchase agreement.

[30] I therefore answer the third question in the negative.

[31] This appeal is therefore allowed with costs here and the costs below. The deposit in court will be returned to the appellant.

[32] My learned brothers Allaudin Mohd Sheriff PCA and James Foong Cheng Yuen FCJ have seen this judgment in draft and expressed their agreement with it.

Appeal allowed with costs here and below.

Reported by Kanesh Sundrum